In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

BENJAMIN H. FULLER and JOHN J. BERNICH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

While we believe we have sufficiently stressed the principal points, constitutional, jurisdictional and otherwise, in the petition for certiorari, still we append, in this very short brief, additional views and authorities in support of the petition.

I.

GOLD RESERVE ACT OF 1934 DOES NOT PROHIBIT "A SALE". IT SIMPLY PROHIBITS "ACQUIRING".

Every count of the indictment is based on a *sale* of gold to the United States Mint. (Tr. 1-43.)

The regulations prescribed by the Secretary of the Treasury under the Gold Reserve Act, to-wit: "Article VI. Purchase of Gold by Mints", apply to *"purchase"* not *"sale"* and any regulation prescribed by the Secretary of the Treasury requiring an affidavit on form TG-19 to accompany *"the sale"* of gold to the United States Mint is not justified by any law of Congress and has no *"clear legislative basis."* The petitioners had a perfect legal right to *sell* gold to the Mint or to anyone else.

The Circuit Court of Appeals for the Ninth Circuit, in this very case, held that the "Gold Reserve Act of 1934" *"does not purport to provide punishment as for a criminal offense."*

Fuller et al. v. United States, 110 F. (2d) 815, *817.*

Therefore, if it be no criminal offense to violate the "Gold Reserve Act of 1934", and the *sale* of gold is not inhibited by the Act, then a violation of any regulation prescribed by the Secretary of the Treasury under the "Gold Reserve Act of 1934" is equally without "clear legislative basis" as and for a criminal offense.

United States v. George, 228 U. S. 14, *22.*

As was well said by the Supreme Court in *United States v. Eaton*, 144 U. S. 677, *688*, 36 L. Ed. 591, *594*:

> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of the law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a *criminal offense* in a citizen, where a statute does *not distinctly make the neglect in question a criminal offense.*"

That case and the case of *United States v. George*, 228 U. S. 14, *should be decisive of the case at bar.* It was there held that while the Secretary of the Interior and Land Department had administrative power to make rules and regulations they had no *legislative* power to create offenses which Congress did not itself legislate upon. Said the Supreme Court:

> "In United States v. United Verde Copper Co., supra, this court considered the power of the Secretary of the Interior under an act of Congress giving the right to cut timber from the public lands for certain purposes, which were enumerated 'or domestic purposes', and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe 'for the protection of the timber and of the undergrowth growing on such lands, *and for other purposes'*. (Italics ours.) The Secretary made a regulation which provided, among other things, that no timber should be 'permitted to be used for smelt-

ing purposes, smelting being a separate and distinct industry from that of mining'. The justification urged for the regulations was that the word 'domestic' meant household. This court rejected the contention and decided that the regulation transcended the power of the Secretary. We said, 'If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. *If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'*

In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. *The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis.* In illustration we may cite Williamson v. United States, 207 U. S. 425; United States v. Keitel, 211 U. S. 370; United States v. Eaton, 144 U. S. 677; Morrill v. Jones, 106 U. S. 466; United States v. Biggs, 211 U. S. 507; Dwyer v. United States, 170 Fed. Rep. 160." (Italics ours.)

II.

GOLD RESERVE ACT OF 1934 IS UNCONSTITUTIONAL, AND THE RULES AND REGULATIONS PRESCRIBED BY THE SECRETARY OF THE TREASURY UNDER SUB. (c) OF SEC. 3 OF THE ACT ARE VOID.

While we think that we have sufficiently presented this matter in the petition, it may not be amiss to refer to a few of the authorities on the subject, to the effect that any regulations under Sub. (c) of Sec. 3 of the "Gold Reserve Act of 1934" (see also Sec. 442, 31 U. S. C. A.) are null and void as being legislative functions delegated to an executive.

In the case of *Uebersee Finanz Korporation, etc. v. Rosen* (1936) (C. C. A. 2nd), 83 F. (2d) 225, Cert. Denied 56 S. Ct. 946, in which the Court was called upon to pass upon the constitutionality of Subs. (a) and (b) of Sec. 3 of the Gold Reserve Act, clearly, in its decision, indicates that Sub. (c) quoted above, was an unlawful delegation of power, viz.:

> "If subdivision (c) 31 U. S. C. A. sec. 442 (c), which enabled the Secretary also to except gold 'for such other purposes as in his judgment are not inconsistent with the purposes of this Act', involves a delegation so broad as to be invalid, the remainder of the Act is separable and is saved from criticism because of any invalidity of subdivision (c), for the reason that section 16 (31 U. S. C. A. sec. 445) which we have quoted, so provides."

As was well said in the case of *United States v. George*, 228 U. S. 14, *22:*

> "We said 'If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. *If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'* * * *"
>
> "In other words, a distinction between the legislative and administrative function was recognized and enforced in the case at bar. *The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis."* (Citing cases.) (Italics ours.)

How apposite is that language to the regulations issued by the Secretary of the Treasury under Subdivision (c), 31 U. S. C. A., Sec. 442. (Sec. 3 of "Gold Reserve Act of 1934", 48 Stat. 340.)

In the *Panama Refining Company* case, 293 U. S. 388, 79 L. Ed. 446, the Supreme Court, in holding the "hot oil" provisions of the N. I. R. A. to be an unlawful delegation of legislative power to the President, ruled that no proper or sufficient standards were provided in the Act to control or limit the executive discretion, viz.:

> "It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in Sec. 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to deter-

mine the policy and to lay it down, as he may see fit." (293 U. S. at 415.) * * *

"So, also, from the beginning of the Government, the Congress has conferred upon executive officers the power to make regulations—'not for the government of their departments, but for administering the laws which did govern'. United States v. Grimaud, 220 U. S. 506, 517, 55 L. ed. 563, 567, 31 S. Ct. 480. Such regulations become, indeed, binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined." (293 U. S. at 428.)

* * * * * * *

"We see no escape from the conclusion that the Executive Orders of July 11, 1933, and July 14, 1933, and the Regulations issued by the Secretary of the Interior thereunder are without constitutional authority." (293 U. S. at 433.)

In the *Schechter* case, 295 U. S. 495, 79 L. Ed. 1570, the Supreme Court, in its unanimous decision condemning the N. R. A. as an unlawful delegation of legislative power, clearly indicated the indispensability of proper standards to control the administrative discretion, viz.:

"It (i. e., the Statute) does not undertake to prescribe rules of conduct to be applied to particular state of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of the codes to prescribe them. For that legislative undertaking, sec. 3 sets up no standards aside from the statement of the general aims of rehabilita-

tion, correction and expansion described in sec. 1. In view of the scope of that broad declaration, and of the nature of the few restrictions imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code making authority thus conferred is an unconstitutional delegation of legislative power." (295 U. S. at 541.)

Other authorities to the same effect are:

U. S. v. Maid, 116 Fed. 650;

U. S. v. Eaton, 144 U. S. 677.

If violations of the "Gold Reserve Act of 1934" or of its regulations can be prosecuted under the false claims act, Sec. 80 of Title 18 U. S. C. A. and, for conspiracy, under Sec. 88, Title 18 U. S. C. A., then it follows that there must be some *"clear legislative basis"* for the crime charged.

The only basis for an accusation under the false claims act is allegedly a false affidavit. This affidavit is provided for by the Gold Reserve Act or, to speak more accurately, by one of the regulations of the Gold Reserve Act. This affidavit forms the basis and lies at the foundation of every count of the indictment. The one directly involved in the case at bar is Sec. 38 of "Article VI. Purchase of Gold by Mints" of Provisional Regulations issued under the Gold Reserve Act of 1934. It provides that:

"An affidavit on form TG-19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the

United States or any place subject to the jurisdiction thereof."

Confessedly, if the affidavit under Sub. 3 of Sec. 442 of the Gold Reserve Act constitutes an illegal delegation of legislative power to an executive, or if the particulars of the affidavit are not provided or prescribed, then the foundation or basis for each count of the indictment falls, because *"where the charge is of crime, it must have clear legislative basis"*.

U. S. v. George, 228 U. S. 14, *22*.

A reading of Secs. 3 and 4 of the Gold Reserve Act will disclose that it is *not* an offense to *sell gold* to the United States Mint. What is inhibited is:

"Any gold *withheld, acquired, transported, melted or treated, imported, exported or earmarked, or held in custody,* in violation of this act or of any regulation issued hereunder, or licenses issued pursuant thereto."

(See 48 Stats. 337-344.)

There is not a word said about the "sale" of gold to the United States Mint nor is that prohibited nor is it made an offense and any regulations under Sub. (c) of Sec. 442 of the Gold Reserve Act inhibiting the "sale" of gold must necessarily be illegal and void.

Every count of the indictment is predicated upon the *sale of gold* to the United States Mint. (Tr. 1-43.)

The conclusion is inescapable that there is no legal justification for the offenses charged and that the conviction even under the false claims act is null and void.

III.

"GOLD RESERVE ACT OF 1934" IS A SPECIAL STATUTE ON THE SUBJECT OF GOLD, GOLD BULLION, ETC. AND SUPERSEDES AND IS AN EXCEPTION TO THE FALSE CLAIMS ACT AS CONTAINED IN SEC. 80 OF TITLE 18 U. S. C. A.

It is not claimed by the prosecution, in the case at bar, that the petitioners defrauded or cheated the United States Mint at San Francisco of a single cent. The mint received every ounce of gold that it was supposed to receive and lost nothing in any of the transactions. Nor, by the wildest stretch of the imagination, was any government function in any way interfered with, nor is there any allegation in any count of the indictment that any Government function was interfered with. Title 18, U. S. C. A., Sec. 80, is a general statute applicable to the presentation of false claims against the United States, whether by trick, scheme or device, whereas, the "Gold Reserve Act of 1934" is a *special* statute limited to transactions involving gold, gold bullion etc., and violations thereof.

That a later special statute applicable to a special class of offenses supersedes and controls over a former and earlier general statute is, of course, elementary. The "Gold Reserve Act of 1934" is a later statute and relates to and is limited to a special subject, to-wit: gold, gold bullion etc. and violations thereof.

> *"It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict*

with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

59 *C. J.* 1056-58 and many cases there collated.

While the offenses charged in the indictment in the case at bar may be within the letter of Title 18 U. S. C. A., Sec. 80 thereof, they certainly are not within the spirit of that law. But whether they are or not, the "Gold Reserve Act of 1934" is a much later act and is a *special act* and constitutes an *exception* to the class of offenses denounced by the former general law as contained in Title 18 U. S. C. A., Sec. 80 thereof. Any violations of the "Gold Reserve Act" or of its many regulations must be prosecuted under that act and are punishable alone under that act.

A mere examination of the many provisions of the "Gold Reserve Act of 1934" will readily establish this. (For Act see 48 Stats. 337-344.)

Besides that, an examination of the "Provisional Regulations issued under the Gold Reserve Act of 1934", dated June 1, 1937, will disclose how carefully and minutely the Secretary of the Treasury with the approval of the President has promulgated some 46 rules and regulations comprehended under eight dif-

ferent articles. These "Provisional Regulations" are readily obtainable at the Treasury Department or from the Director of the Mint.

Further argument on this branch of the case would seem to be unnecessary. It is respectfully submitted that this prosecution, resulting in a conviction of the two petitioners (the acquittal of four others similarly charged) was brought under the *wrong statute*. It should have been brought, as the Congress intended, under the "Gold Reserve Act of 1934" for violation of its regulations issued by the Secretary of the Treasury. The indictment discloses, in every count thereof, that the defendants were all accused of a violation of the "Gold Reserve Act of 1934" and that a violation of one of its regulations, to-wit: Section 38, providing for certain forms of affidavit, is the basis and foundation of the accusation in every count.

Section 7 of the "Gold Reserve Act of 1934" provides: "All acts and parts of acts inconsistent with any of the provisions of this act are hereby repealed."

For authorities on the subject that a later and a special act supersedes a former general law, see:

U. S. v. Tynen, 11 Wall. 88, 20 L. Ed. 153, *154-155;*

U. S. v. Auffmordt, et al., 122 U. S. 197, 30 L. Ed. 1182-*1185;*

U. S. v. Wyndham, 264 Fed. 376, *377;*

Gorman v. Hammond, 28 Ga. 85;

Jackson v. Cravens, 238 Fed. 117, *120;*

Snitkin v. U. S., 265 Fed. 489.

It is respectfully submitted that both the trial Court and the Circuit Court of Appeals for the Ninth Circuit erred in not sustaining the demurrer to the indictment on this ground alone. (Tr. 54-63; 147.)

IV.

PROSECUTION EVEN UNDER FALSE CLAIMS ACT CANNOT BE SUSTAINED.

Crime, in this country, must have *clear legislative* basis.

U. S. v. George, 228 U. S. 14, *22;*

The Circuit Court of Appeals for the Ninth Circuit (see Appendix, p. iii), in its opinion, concedes that "The regulation does not particularize the information to be included in the affidavit".

The prosecuting attorney, who appeared before the Circuit Court of Appeals, also conceded that "The contents of the affidavit (form TG-19) are not set forth in the regulations".

This affidavit, form TG-19, as we have seen, is required by Sec. 38 of "Article VI. Purchase of Gold by Mints" of Provisional Regulations issued under the Gold Reserve Act of 1934. (See Appendix, pp. v-vi.)

But if the regulation does "not particularize the information to be included in the affidavit", what law, what statute, what regulation does?

We further submit that where the regulations do "not particularize the information to be included in the affidavit" the Circuit Court of Appeals, by judicial construction, cannot in effect legislate a regula-

tion for the Secretary of the Treasury. The regulation itself, assuming it to be constitutional and not an unlawful delegation of legislative power, must "particularize the information to be included in the affidavit". In the absence of any particularization on the subject there can be no prosecution for crime based on perjury or falsity, whether under the false claims act or any other act.

The Circuit Court of Appeals holds in effect that the Gold Reserve Act does not create any offenses or crimes and yet it holds that under the false claims act the petitioners can be prosecuted for acts which are not in themselves criminal and for a conspiracy of acts which are not in themselves criminal, *and for which there is no clear legislative basis.*

We have ventured the statement once before that offenses and crimes cannot be evolved out of a "fiction of law".

There is *no clear legislative basis* for affidavit on "Form TG-19" (which permeates the entire indictment). The particulars of the affidavit are not set forth or prescribed or provided for by the Secretary of the Treasury, conceding, which we do not admit, that the Secretary of the Treasury under Sub. (c) of Sec. 3 of the Gold Reserve Act of 1934 had the slightest power to make any regulation providing for affidavit on "Form TG-19" or any other affidavit.

We may be pardoned if we make reference "as to how certain tyrants put their laws on pillars so high that plain citizens could not mark, learn, and inwardly digest the same".

See *Vannata v. United States,* 289 Fed. 424, *429.*

V.

OFFENSES CHARGED IN FIRST SIX COUNTS OF INDICTMENT WERE COMMITTED AND SHOULD HAVE BEEN TRIED WITHIN NORTHERN DIVISION OF NORTHERN DISTRICT OF CALIFORNIA.

As stated in the Petition for Certiorari these offenses were committed in the *Northern Division* of the Northern District of California but were tried, over the protest and objections of the petitioners, within the *Southern Division* of the Northern District of California, although timely plea in abatement and motion for change of venue based on sworn affidavits were made.

We have fully presented this point in the Petition and contend that the action of the trial Court and of the Circuit Court of Appeals, in denying petitioners the right to be tried in the place where these particular offenses were committed, were clearly erroneous and indefensible.

VI.

BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED.

We believe we have sufficiently set forth in the Petition for Certiorari the grounds and reasons why the trial Court and the Circuit Court of Appeals erred in denying the motion for a bill of particulars under the circumstances disclosed by the record in this particular case.

VII.

ADMISSION OF 200 OR MORE AFFIDAVITS ABOVE REFERRED TO GROSS, INEXCUSABLE AND PREJUDICIAL ERROR.

We believe that a mere statement of this gross, inexcusable error on the part of the trial Court and of the Circuit Court of Appeals is sufficient of itself, under the facts disclosed by the record, to justify the granting of the petition for writ of certiorari.

Under all the elementary rules of criminal law which protect a person accused of crime, the bill of particulars should have been granted and the 200 or more affidavits of a total stranger to the case excluded from the consideration of the jury.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, *593;*

Schreve v. United States, 77 F. (2d) 2, *9.*

VIII.

MISCONDUCT OF ASSISTANT PROSECUTING ATTORNEY SHOULD RESULT IN A NEW TRIAL.

As we have already pointed out in the Petition for Writ of Certiorari, and which we again assert without fear of contradiction, the prosecution presented no evidence whatsoever of any conspiracy between the petitioners and George Franklin Fuller, Sr., a total stranger to the case or any other "unknown individual" although it promised repeatedly to do so. (Tr. 179-180-181-182.)

The inexcusable remarks made by the prosecuting attorney that "it would be cumbersome to file an indictment containing 200 such affidavits" undoubtedly led the jury to believe that the prosecution could have presented an indictment containing 200 or more charges against the petitioners.

Under the decision of the Supreme Court of the United States in *Berger v. United States,* 295 U. S. 78, 79 L. Ed. 1314, *1319-1322,* misconduct of a prosecuting attorney tantamount to that presented by the record in the case at bar was held to deprive the defendant of a fair and impartial trial and to justify a reversal.

Much that the Supreme Court, through Mr. Justice Sutherland, said in that case is applicable to the case at bar.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.
>
> It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming', a different conclusion might be reached. Compare Fitter v. United States (C. C. A. 2d) 258 F. 567, 573; Johnson v. United States (C. C. A. 7th) 215 F. 679, 685, L. R. A. 1915A, 862; People v. Malkin, 250 N. Y. 185, 201, 202, 164 N. E. 900; State v. Roscum, 119 Iowa 330, 333, 93 N. W. 295. *Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.* Compare New York C. R. Co. v. Johnson, 279 U. S. 310, 316-318, 73 L. ed. 706, 709, 710, 49 S. Ct. 300.

> The views we have expressed find support in many decisions, among which the following are good examples: People v. Malkin, 250 N. Y. 185, 164 N. E. 900, supra; People v. Esposito, 224 N. Y. 370, 375-377, 121 N. E. 344; Johnson v. United States (C. C. A. 7th) 215 F. 679, supra; Cook v. Com., 86 Ky. 663, 665-667; Gale v. People, 26 Mich. 157; People v. Wells, 100 Cal. 459, 34 P. 1078. The case last cited is especially apposite.
>
> Judgment reversed."

This decision is peculiarly applicable to the case at bar. The misconduct of the prosecuting attorney was glaring, persistent and continued. (See instances set out in assignments of error Nos. XXI, XXII, XXIII, Tr. 159-164; XXVI, XXVII, XXVIII, Tr. 166-176.) The prosecuting attorney insisted that *"it would be cumbersome to file an indictment containing 200 such affidavits"*. He, time and again, sought to justify the introduction of all of these extraneous affidavits on the ground that *"it also goes to show the conspiracy and means of completing this conspiracy"*. And yet, no conspiracy was ever proven between the person, George Franklin Fuller, Sr., whose 200 or more affidavits were introduced in evidence over objection and exception, and the two petitioners, or either of them, or anyone else. The jury was undoubtedly impressed with the fact that the two petitioners had something to do with these 200 or more affidavits executed by George Franklin Fuller, Sr., without the slightest bit of evidence to justify such an inference or impression, save and except the statement of the prosecuting attorney that *"it would be cumbersome to file an indictment containing 200 such affidavits"*.

Furthermore, this decision is applicable in that the case against Berger was not strong, which is the fact in the case at bar. There was absolutely not the slightest *direct* evidence that the six affidavits charged against petitioners were false. There was nothing in the case against the petitioners except surmises, conjectures, inference on an inference or presumption based on another presumption which evidence is condemned by the Supreme Court of the United States in such cases as *United States v. Ross,* 92 U. S. 281, 23 L. Ed. 707, *708,* and other decisions of the Federal Courts as being totally insufficient to sustain a conviction. The circumstances of guilt urged by the prosecuting attorney were equally consistent with those of innocence and on that ground alone the jury should and would have acquitted the petitioners but for the misconduct of the prosecuting attorney and the introduction in evidence of the 200 or more affidavits of a total stranger to the case and other serious errors committed by the trial Court.

Hayes v. United States, 169 Fed. 101, *103;*
Mickel v. United States, 157 Fed. 229;
Wright v. United States, 227 Fed. 855, *857;*
Van Gorder v. United States, 21 F. (2d) 939, *942;*
Turinetti v. United States, 2 F. (2d) 15, *17.*

The case was so weak that the trial Court was compelled to direct the jury to instruct to acquit against two of the defendants and the jury acquitted two other defendants out of the six then on trial.

It is respectfully submitted that, based on this flagrant misconduct of the prosecuting officer that "*it*

would be cumbersome to file an indictment containing 200 such affidavits" implying and practically telling the jury that the prosecution had 200 more charges against the petitioners, serious and prejudicial error was committed depriving the petitioners of a fair and impartial trial which should result in a reversal and granting of a new trial.

IX.

EVIDENCE TOTALLY INSUFFICIENT TO JUSTIFY CONVICTION ON EITHER SUBSTANTIVE OFFENSES OR CONSPIRACY CHARGE.

We believe that we have fully presented this point in the Petition for Certiorari and that further argument or citation of authority would not strengthen our plea in this respect.

We, however, remind this Honorable Court of the onerous burden cast upon the petitioners when the Court of Appeals took the view that "appellants did not take the stand". (See opinion in Appendix to this Petition, p. iv.)

It was the constitutional right of the petitioners not to take the stand and to remain silent and no inference of guilt could be indulged in by the trial jury, or the trial Court or, we respectfully submit, by the Circuit Court of Appeals, because the petitioners did not take the stand and relied upon the insufficiency of the evidence presented by the prosecution.

We again remind this Honorable Court that the Circuit Court of Appeals for the Ninth Circuit did

not give petitioners the benefit of their views as to the constitutional questions presented to them, nor as to the unlawful delegation of legislative power to an executive officer under the "Gold Reserve Act of 1934" and its regulations, but ignored these important matters, which were strongly and vigorously called to its attention on the original argument, both orally and by briefs, and upon the rehearing.

Without further prolonging this short brief, we respectfully submit that the petition for the writ of certiorari should be granted and for such other and further relief as to this Honorable Court may seem proper and just.

Dated, San Francisco, California,
June 28, 1940.

Respectfully submitted,
MARSHALL B. WOODWORTH,
Attorney for Petitioner.

(Appendix Follows.)